and, accordingly, they must merge so that they can also simultaneously enter markets like Albany, Birmingham, and Norfolk. *Id.*; Kahan Aff., Att. A.

In this regard, Applicants' arguments that this incremental entry strategy could not succeed because it could only promise a "national footprint" in "ten years," Carlton Aff. ¶¶ 20, 22, could only be designed to mislead. Applicants' submissions setting forth their 30 city plan utilize the *same* time frame. Kahan Aff. ¶¶ 43, 60, 62, 80. Nor is there any basis for concluding that entry into any given market will be faster with the merger than without it. For example, Ameritech's entry into St. Louis, where it is already present, and SBC's entry into New York could be accomplished as quickly as any merged entity could enter. Speed of entry on a non-facilities basis depends on the cooperation of the incumbent LEC. On a facilities basis, each party concededly can accomplish a 15 city build unilaterally; together they can do a 30 city build. But either way there are thirty sets of facilities built in the same time frame. Local competition is not enhanced simply because the merger avoids Ameritech and SBC competing against each other in some of the out-of-region markets (*e.g.*, New York City). Carlton Aff. ¶¶ 24, 30. And neither the Act nor the antitrust laws prefer more markets with one out-of-region competitor over fewer markets in the same time frame with multiple competitors. Both contemplate that market forces, not coordinated private decision making, should determine where and when competition emerged.

b. Personnel

Applicants' assertion that the merger is necessary to obtain the necessary employee and management skills, Application at 52-53; Kahan Aff. ¶¶ 77-78, Carlton Aff. ¶¶ 31-35, is also flatly wrong. Elsewhere, Applicants concede that they must hire 8,000 new employees not currently employed by either company to implement their "National-Local" strategy. Kahan Aff. ¶¶ 59, 77. That is because (presumably) Applicants' present employees are already

fully engaged in administering Applicants' existing monopolies and cannot simply be transferred *en masse* to Applicants' new local services ventures. Nor can the merger in this regard result in any economy of scope, since Ameritech and SBC are both engaged in the same lines of businesses and, accordingly, Ameritech's employees do not possess any skills that SBC's do not already have (and *vice-versa*).

c. Market reaction

Applicants' argument that they must pursue this merger because their shareholders would prefer they fund out-of-region entry with the financial basis of two monopolists rather than one, Application 51-53; Kahan Aff. ¶¶ 79-82; Weller ¶ 34, is pure sophistry. Of course the shareholders of each company would prefer a merger that eliminates each other's most significant competitor and produces a bottleneck monopoly that stretches from Michigan to Texas (and includes the nation's most populous state, California). But, so long as local entry can be undertaken profitably by each Applicant -- and as explained above, it can -- such entry will increase returns to shareholders and increase each companies' stock values. Thus, the fact that a strategy that insulates Applicants from local competition may prove more profitable to Applicants' shareholders cannot provide the basis for approval of this merger which examines the "public interest." *See* Levinson Aff. ¶ 4.

3. Applicants Have Failed to Address Less Anticompetitive Alternatives

Finally, Applicants provide the Commission with only their bare assertion that less anti-competitive alternatives to the merger are infeasible. Application at 19-20. That assertion is plainly wrong. For example, if SBC believes it needs greater scale economies to compete out-of-region, it does not have to purchase another monopolist to obtain that scale. Rather, it could do what MCI and AT&T have done and acquire *complementary* facilities like those owned by cable

operators, competitive access providers and competitive local exchange carriers. If, as Applicants say, their markets are open to competition, such facilities in the Ameritech region should be available for purchase by SBC and *vice-versa*. This would, for example, give SBC not only access to the Fortune 500 companies in Ameritech's region, but also ownership of facilities in other regions -- thereby making its out-of-region strategy *more* viable. It would also provide SBC with the personnel necessary to compete out-of-region thereby saving the company from having to hire 8,000 more employees to implement its out-of-region, local entry strategy. Such complementary purchases would also protect Applicants against shareholders' dilution. The only things such a strategy would not accomplish are the separate, anticompetitive objectives that this particular merger uniquely would achieve.

B. The Merger Will Not Enhance Global Competition

Applicants also argue that the merger will enhance global competition because it will "create a major new U.S. participant in the global telecommunications market." Application at 25; Kahan Aff. ¶¶ 65, 67. This contention is flawed for two independent reasons. *First*, Applicants, in touting their own accomplishments, make it clear that they are already each positioned to be a global competitor on their own. SBC has a presence in Europe, Asia, Africa and South America, Kahan Aff. ¶¶ 66; Ameritech tells its shareholders that it does business in "more than 40 countries," Ameritech 1997 10-K at 5.[38] *Second*, Applicants identify six other major American and foreign facilities based global competitors -- including British Telecom ("BT"), AT&T (currently partnering with World Partners; if its future venture with BT is approved then with BT), Sprint (as part of Global One), MCI/WorldCom, Cable & Wireless, and

[38] Indeed, the magnitude of Applicants' overseas investments demonstrates the extent to which their earnings on local exchange and exchange access services are inflated.

Nippon Telephone and Telegraph ("NTT"), Kahan Aff. ¶ 68 -- thereby making plain that this market is vigorously competitive and that foreign carriers will be available to partner with SBC, Ameritech or both. Moreover, there are numerous other global competitors not mentioned by the Applicants, including Applicants' sister RBOCs (most notably Bell Atlantic and BellSouth), and Telefonica. *See* Ameritech 1997 10-K at 12. Thus, the value of merging two already well-positioned competitors, in a market with numerous other competitors, is at best *de minimis*. If anything, the merger would reduce competition by the two Applicants against each other because Ameritech and SBC are already significant competitors in Europe.[39]

Applicants further argue that even though each is already heavily invested in at least fifteen foreign markets with their unilateral investments exceeding $11 billion, Application at 26, the merger is necessary because only through joint efforts will they install 1,400 kilometers of fiber overseas in two years, and 14 switches in unnamed cities in three years -- maybe, *id.* at 27; Kahan Aff. ¶ 67 (referring to these plan as "preliminary"). In light of their past investment each could, and likely would, have made comparable foreign investments on their own.

Finally, Applicants' contention that the Commission can rest assured that this foreign investment will improve the quality and availability of foreign services to U.S. companies looking to obtain such services overseas, lower accounting rates, facilitate international trade and improve U.S. competitiveness, and bring long-term economic development to developing countries, because each carrier's prior international investments had this effect, Application at 27-31, is

[39] Applicants, conceding that Ameritech's investment in Europe (estimated at $6 billion, Ameritech 1997 10-K at 5) exceeds that of any other U.S. carrier, claims that their investment falls short of the resources "available" to BT, Deutsche Telekom, France Telecom and NTT. Application at 35. But other U.S. carriers such as MCI/WorldCom effectively compete in Europe and elsewhere, and the Applicants provide absolutely no evidence that Ameritech's resources are not enough.

manifest hyperbole. And even if Applicants could substantiate these overblown claims that such results are likely because their individual past investments created these benefits, their argument would prove too much. If their unilateral conduct had this effect, then there can be no demonstrable benefit to the merger.

C. The Merger Would Produce No Cognizable Pro-Competitive Cost Savings Or Other Efficiencies

Applicants bear the burden of proving any pro-competitive efficiency benefits from the merger. *BA-NYNEX Merger Order* ¶ 157-58. Applicants have failed to shoulder their burden. The efficiencies claimed by Applicants -- sharing of "best practices," economies of scale and scope, and elimination of duplicative research and development -- are all achievable without a merger and are speculative at best.

1. Best Practices

Applicants claim that they will increase their joint revenues as a result of sharing their "best practices" with each other. Application at 46-49. However, this claim is simply an admission that neither SBC nor Ameritech is efficiently run. Applicants do not list a single "best practice" that could not be implemented without a merger. *See id.* Indeed, SBC's apparent view that Ameritech is woefully behind in developing and selling high-margin vertical services, *see* Application at 47, Kaplan Aff. ¶¶ 8-9; Affidavit of Richard Gilbert and Robert Harris ("Gilbert/Harris Aff.") ¶¶ 53 (Application, Tab 25), if anything suggests that SBC could have profitably entered Ameritech's market.

Particularly remarkable are SBC's claims that Ameritech could learn its "best practices" in marketing techniques. Application at 47; Kaplan Aff. ¶¶ 8-9. Indeed, it was precisely such "best practices" that SBC shared with Pacific Bell and that resulted in California's Office of Ratepayer Advocate asking the California PUC to bar Pacific Bell's "harmful and misleading sales and

marketing practices." Jonathan Marshall, *Pac Bell's Practices Under Fire*, San Francisco Chronicle, at B1 (June 5, 1998) ("*Pac Bell Under Fire*"); *see also* Blitch Aff. ¶¶ 33-35. Teaching Ameritech high pressure sales techniques,[40] the unauthorized use of customer account information,[41] how to avoid disclosing available options,[42] and how to force ratepayers to endure long waits for customer service[43] are hardly pro-competitive efficiencies that can justify this merger. *See generally* Blitch Aff. ¶¶ 31-38.

2. "Consolidation Efficiencies"

Applicants' claims regarding "Consolidation Efficiencies," Application at 40; Kaplan Aff. ¶¶ 17-25, are the type of cost-savings routinely claimed by merger applicants. *See, e.g., BA-NYNEX Order* ¶¶ 161-64. But as the Commission has recognized, such cost cutting can be undertaken independent of the merger. *Id.* ¶ 169. Moreover, Applicants also fail to provide any support for their claimed savings other than the bare assertions of their affiant Martin Kaplan. *See* Kaplan Aff. ¶ 20. Without any back-up, Applicants cannot be said to have "carried their burden of demonstrating that the proposed merger will create verifiable merger-specific efficiencies that offset the merger's competitive harms." *BA-NYNEX Order* ¶ 168.

Applicants cannot salvage their claims by having their economists label their purported cost savings "economies of scale." *See* Affidavit of Richard Schmalensee and William Taylor ("Schmalensee/Taylor Aff.") ¶¶ 8-13 (Application, Tab 28). Applicants' economists simply

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[40] *Pac Bell Under Fire*, *supra*, at B1.

[41] *Id*; George Avalos, *Pacific Bell Wants to Solicit Unlisted*, Contra Costa Times, at A1 (May 5, 1998).

[42] Wendy Tanaka, *PUC Calling Pac Bell on Sales Tactics*, San Francisco Examiner, at B2 (June 5, 1998).

[43] Rebecca Smith, Pac Bell Tactics Attacked, San Jose Mercury News, at A1 (June 5, 1998).

repeat the numerical estimates provided by SBC and provide no analysis of their own. *See* Schmalensee/Taylor Aff. ¶¶ 8-13. Moreover, as another of Ameritech's expert economists has conceded, in the long run a modern telecommunications firm has few truly fixed costs; rather, most overhead costs are variable and increase proportionately as the size of the firm increases. *See* Levinson Aff. ¶ 15 & Att. B (citing testimony of Ameritech witness Debra Aron). Thus, substantial cost savings cannot be achieved simply by spreading fixed costs over greater output. *Id.*

On the other hand, the Commission can be confident that by denying the Application and forcing Ameritech and SBC to compete, consumers will benefit from real cost savings. That is because neither Ameritech nor SBC is currently subject to effective competition and it is well-established that rate regulation of monopolies is not sufficient to eliminate inefficient operations and management. True competition, however, will force Applicants to become efficient or lose market share. Levinson Aff. ¶¶ 14-15.

Finally, Applicants cannot justify their claimed efficiencies on the basis of SBC's acquisition of PacBell. Application at 40-42. As explained in the accompanying affidavit of Mr. Lee Blitch, SBC has done little, if anything, to improve PacBell's traditionally mediocre service. Blitch Aff. ¶¶ 44-48. If anything, the merger has made things worse. *Id.* In fact, complaints against Pacific Bell have *doubled* since the SBC merger. Steve Ginsberg, *PacBell Facing Possible Probe over Service,* San Francisco Business Times, at 1 (Feb. 27-March 5, 1998).

3. "Geographic Expansion"

Applicants' claim of economies of scope -- *i.e.,* "Geographic Expansion" -- are similarly overblown and undocumented. *See* Application at 43. Applicants' claimed economies of scope, by definition, can only relate to geographic scope since Ameritech and SBC currently provide the

same products and services. But the economies provided by Ameritech's and SBC's presence in each other's markets (*i.e.*, linking customer service centers and consolidated mobile service support systems) could already be realized unilaterally because of the Applicants' out-of-region wireless footprint and because, as explained above, each carrier could unilaterally achieve a national footprint. The economies provided by a global market (*i.e.*, linking customer centers globally and providing multilingual customer support) can similarly be realized unilaterally by the current international footprint of both Applicants and the independent need for domestic multilingual support.

4. Research and Development

Finally, Applicants' repeated assertions that the public will benefit from the merger because the combination will reduce duplicative research and development and lead to better products, Application at 4-5, 44-46; Gilbert/Harris Aff. ¶¶ 35-38; Schmalensee/Taylor Aff. ¶¶ 12-13, is ironic. That is because in its *Bell Atlantic-NYNEX Merger Order* the Commission found that similar arguments made by Bell Atlantic and NYNEX provided another example of why that merger (absent the conditions imposed by the Commission) would be *anticompetitive.* More precisely, the Commission observed that "[r]esearch and development . . . is a means through which firms engage in non-price competition, by seeking means to differentiate products either in function or quality" and that "[e]limination of parallel research and development efforts would eliminate this form of non-price competition" and "reduc[e] output." *Bell Atlantic-NYNEX Merger Order* ¶ 171. Likewise, the federal antitrust authorities have stated that they will view firms with specialized research and development capabilities as competing in separate "innovation markets" and will block transactions that reduce competition in those market. *See, e.g.*, United States Department of Justice/Federal Trade Commission Antitrust Guidelines for the

Licensing of Intellectual Property § 3.2.3, Example 4, *reprinted in* 4 Trade Reg. Rep. ¶ 13,132 (1995) ("DOJ/FTC Intellectual Property Guidelines") (citing cases).

Because of the high costs and expertise necessary, large incumbent LECs are often the only firms that engage in the research and/or development (or directly fund such research and development) of many advanced telecommunications technologies, especially the "field research" necessary to take a new technology from the lab to a real network. But after the merger, there will be only four other firms (BellSouth, US WEST, Bell Atlantic, and GTE -- that latter two of which have announced their intention to merge) that will be able to compete in these innovation markets.[44] Such high concentrations in a field with such significant barriers to entry clearly permit the exercise of both unilateral and coordinated market power. *See* DOJ/FTC Intellectual Property Guidelines § 3.2.3, Example 4, (a joint venture eliminating such competition such that there are only three other independently controlled entities with similar capabilities and incentives would create significant risk of anticompetitive effects in the innovation market).

[44] Astonishingly, Applicants brush aside these concerns, through their affiants Drs. Richard Schmalensee and William Taylor, on the basis of the *ipse dixit* statement that "the firms do not compete through research and development," Schmalensee/Taylor Aff. ¶ 20. Yet Applicants elsewhere claim, through their affiants Drs. Richard Gilbert and Robert Harris, that "[b]oth Ameritech and SBC have experience in developing" advanced technologies like Digital Subscriber Loop ("DSL") and that the merger will eliminate duplicate efforts, Gilbert/Harris Aff. ¶¶ 34-38. Both carriers also appear to have taken different approaches for overcoming the problems that plague deployment of DSL. *Id.* ¶¶ 36-37. Indeed, if Applicants' do not compete through research and development, Applicants' claims that the merger would achieve costs savings in this area would clearly be baseless.

CONCLUSION

For the reasons stated above, the Commission should deny the Applications.

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October 15, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached document has been served via fed-ex, except where noted, on this 15th day of October, 1998, on the following parties:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AMERITECH CORPORATION, Transferor to SBC COMMUNICATIONS INC., Transferee	))))))))))	CC Docket No. 98-141

EXHIBITS TO
PETITION OF AT&T CORP. TO DENY APPLICATIONS

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October 15, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses and	)	
Section 214 Authorizations from	)	CC Docket No. 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	

AFFIDAVIT OF RUSSELL MORGAN
ON BEHALF OF AT&T CORP.

Russell Morgan, being first duly sworn on oath, deposes and state as follows:

1. I am Regional Vice President Southwestern States for AT&T Corp. ("AT&T"). AT&T's Southwest Region includes Texas, Oklahoma, Missouri, Kansas and Arkansas.

2. I have worked in the Southwest Region since 1996 on a variety of local service entry and long distance competition matters, including AT&T's negotiations with Southwestern Bell Telephone ("SWBT") and GTE Corporation ("GTE") under the Telecommunications Act of 1996.

3. A necessary condition to AT&T's entry into the local market in SWBT's service area is the development of computerized operating systems by both

AT&T and SWBT that allow customer and operating information to flow seamlessly between the two companies.

4. AT&T retained Ernst & Young ("E & Y") as the systems integrator to manage the development of AT&T's operating systems. On March 30, 1998, AT&T submitted a letter to the Texas Public Utility Commission ("PUC"), copied to counsel for SWBT, publicly disclosing for the first time AT&T's retention of E & Y and describing the schedule for the development and implementation of AT&T's operating systems.

5. On March 31, 1998 Mr. Ed Whitacre, Chairman of SBC, telephoned Mr. Philip Laskawy, Chairman of E & Y, regarding AT&T's retention of E & Y. See, Attachment A appended hereto. See also Discussion of Texas PUC Commissioners Dkt. No. 16251, May 21, 1998 Open Meeting Transcript, pp. 325-333, appended hereto as Attachment B.

6. On that same day, March 31, 1998, AT&T received a call from representatives of E & Y stating, E & Y intended to disengage from the AT&T project.

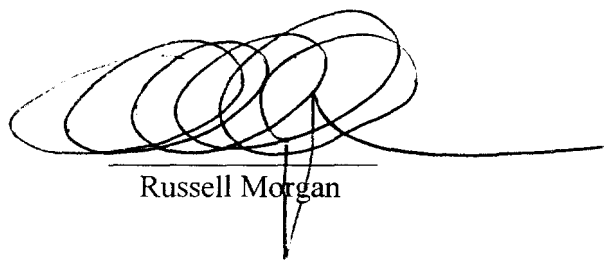
7. Except for the limited work activities necessary for E & Y to disengage from the AT&T project, further operating systems development work was effectively halted.

8. As a consequence of the disengagement of E & Y, AT&T was forced to substantially delay its computerized operating systems development activities. On June 15, 1998, AT&T file a petition initiating a lawsuit against SBC and SWBT in the 192nd District Court, Dallas County, Texas asserting that the activities described above constitute a tortious interference with contract or prospective contract and unfair

competition. See Amended Petition, filed on August 4, 1998, appended hereto as Attachment C. That case is set for jury trial on July 12, 1999.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on October 10, 1998



Russell Morgan

SUBSCRIBED AND SWORN TO BEFORE ME this 10 day of October 1998.

Patricia W. Lowe
Notary Public

My Commission Expires:

7-8-2000

A

April 2, 1998

MEMORANDUM FOR FILE

Re: Ernst & Young

This memo is to document my conversations with various Ernst & Young executives regarding their engagement with AT&T on the Texas Local Factory platform and systems development.

On the evening of Tuesday, March 31, 1998, I was alerted by Mr. Saboo of my staff that we had been contacted by the Ernst & Young account manager, Rudy Valli, regarding their intention to terminate their involvement on the systems and platform development work for the Local Factory.

On Wednesday, April 1, at 12:35 p.m., I had a personal conversation with Mr. Valli of Ernst & Young regarding this situation. He related the following sequence of events:

At approximately 1:30 p.m. on March 31, the account manager from Ernst & Young who handles the SBC account contacted him and faxed to him a copy of AT&T's letter regarding our implementation schedules that had been filed with the Texas Public Utilities Commission on Monday, March 30. Ernst & Young was identified in this letter as being the prime contractor for our development efforts. He indicated that they had acquired this letter via fax from the office of Jim Ellis (SBC's Chief Counsel). He expressed to me that the SBC account executive from Ernst & Young suggested that this may be troublesome between the two client groups. It was shortly thereafter that he and the SBC account executive were engaged in a conversation with Mr. Gary Vanderlinden who is the principal partner for telecom consulting for Ernst & Young. Mr. Vanderlinden relayed to them that shortly prior, the Chairman of Ernst & Young, Mr. Phil Laskawy, had received a call from the Chairman of SBC, Mr. Ed Whitacre regarding the referenced letter. He indicated to them that Mr. Whitaker expressed a conflict of interest, and that Mr. Laskawy had decided no other course but to terminate AT&T's engagement. He told me that very little appeal from him was accepted, and that he was told the decision had been made and to therefore notify AT&T.

On the evening of Wednesday, April 1, I had a personal conversation with Mr. Gary Vanderlinden. Mr. Vanderlinden confirmed that Mr. Laskawy had been contacted directly by Mr. Whitacre and that he had expressed a conflict of interest with regards to their engagement with AT&T. Further inquiry with regards to the specifics of the conflict of interest argument, Mr. Vanderlinden acknowledged that it was not a direct specific conflict with regard to the work they were doing for AT&T vs. that for SBC, but rather a general one. He indicated that Mr. Whitacre expressed concern with "helping AT&T get into the local market". He expressed the feeling of being caught in the middle and felt that Ernst & Young had no other choice to make.

On Thursday, April 2, at 9:40 a.m., I had a personal conversation with Mr. Vanderlinden, Mr. Roger Nelson (Partner for all Ernst & Young consultants), and Mr. Laskawy, Chairman of Ernst & Young. Again, the direct contact with Mr. Whitacre was reaffirmed. Mr. Laskawy indicated that in these cases where a major client expresses a conflict of interest, that it was their policy to take action. Although Mr. Laskawy acknowledged that there wasn't any direct conflict in his mind and that appropriate firewalls had been established, he did express his need to address the concerns of a major client. He expressed the desires to make the transition as easy as possible, but his decision remained the same.

In addition, on April 2, I recontacted Mr. Valli and requested a letter from a partner of Ernst & Young expressly indicating their intention and reason for such.

RIAN WREN

Friday.

CHAIRMAN WOOD: Please also make those available on our Internet web page simultaneous with your filing so that they can be pulled down, not through interchange but at no cost to these parties and other interested parties who are keeping an eye on what we're doing.

I could use a break, so why don't we take one.

MR. SIEGEL: Chairman, for the parties, how long?

CHAIRMAN WOOD: Ten minutes.

(Brief recess)

AGENDA ITEM NO. 18

PROJECT NO 16251
INVESTIGATION INTO SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO IN-REGION INTERLATA SERVICE UNDER SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

CHAIRMAN WOOD: We'll go back on the record. We don't have much more. Project 16251. Further thoughts on the process?

COMM. CURRAN: Yeah. I just

wanted to -- we may -- I don't think we've lost too many parties. On the collaborative process that we've spent so much time discussing, I -- I really would impress upon the parties that I think it's our -- our joint view up here that this is a process that really is designed to try to come to some sort of closure and work out some of the problems that we've seen in a -- in a cooperative process so that we can -- we can -- we can get to some finality.

And if the parties would please -- I know it's very difficult, but please refrain from -- from viewing this process as a -- as a place to posture, as a place to litigate, as a place to stake out positions. I mean, if you don't think you can be helpful to the process, then, frankly, stay away. That is better than going in there and -- and -- you know, you all -- everyone will have an opportunity to -- to address and comment, et cetera. But I think what -- you know, what we really are faced here with is ultimately coming to a commission -- coming to a commission decision as to whether we think these things have been

met. And while, you know, everyone has been extremely helpful, I think you can be helpful in the process by -- by approaching it that way. And -- and I thank you for doing that.

And also, for the staff, I mean, this is obviously -- this is a huge process still to come, and I think you all should feel comfortable in splitting yourselves up and maybe -- you know, all of you don't have to be in everything. If you need us to say that to you, that we don't expect everyone to be on top of everything. Split yourselves up in a rational, efficient way and move on these -- on these subjects. And it may be that by doing that, you know, you're going to have to look to see which of the parties are most interested in certain issues and so you don't double up because they can't be in two places at once. But on the other hand, if there's parties interested in only one proceeding, go ahead and schedule another one at the same time, even if they can't be there, because they might not have any interest in it. And I think that would be a better -- I mean, I think you should feel comfortable doing that.

CHAIRMAN WOOD: I think that's -- I totally associate myself with that.

COMM. WALSH: That makes three.

CHAIRMAN WOOD: What else on --

JUDGE FARROBA: We have another procedural matter in Project 16251. There is an appeal by Southwestern Bell of ruling on the deposition of Mr. Whitacre, and then in response -- AT&T filed a response and, I believe, a conditional appeal of the order on the deposition of Mr. Wren, dependent upon your ruling on that appeal by Southwestern Bell.

COMM. CURRAN: Go ahead? Well, I voted to hear this appeal, and I think the reason I did -- well, there's a number of reasons I did. One is -- my understanding of the issue really is -- is that the -- the sole question is whether Mr. Whitacre improperly pressured Ernst & Young. And it seems to me that should be the sole focus of -- of any deposition -- or for any deposition and -- and

not a general fishing expedition for everything else.

But having said that, I think there's a long history in litigation and a long history in administrative law that if there is a way to spare CEOs from having to be pulled into -- and away from running their businesses and pulled into these things, if there's a way to get information and to get evidence from some other reliable source, that that should be done. And it seems to me that here there have been depositions of the -- of the individuals on the other side of those telephone conversations, and there's certainly no evidence that I've seen that there's any reason to doubt the veracity of the information obtained, so I don't see the necessity of deposing Mr. Whitacre. And so I would grant the appeal.

CHAIRMAN WOOD: I also added that I guess -- I've kind of been thinking a lot about this issue in the last week and I've kind of gone all over the map. My initial thought was on the fishing expedition issue, that it was a bit -- left a little bit broad

here, and so Monday I voted to add. I've since read the entire depositions from Mr. Laskawy -- or Laskawy and Mr. Spiropoulos. And in light of what we just did, I mean, I think one of the -- one of the things that -- and it's in the -- in the full draft of the staff recommendation is we said that the corporate attitude and the corporate behavior wasn't right.

This evidence here, to me, if the company doesn't wish to rebut it more than what they've done on their pleadings, stands as it is, and I think it is -- is pretty damning. But I don't think it's damning quite for the same reason that the parties on either side allege or disavow. I think it's damning because OSS is not a contested issue. Getting AT&T to get its EDI up and operational is something you ought to bend over backwards to make happen. And the fact that it's deemed by -- by your company and your advocacy, to be fair, Mr. Kridner, and on the other side as well, from AT&T, that this is a point of contention bugs me a lot deeper than, you know, what Ed Whitacre did or didn't do over

the telephone, because this is an issue that is not a contested issue. This commission has decided it. I don't notice that needing AT&T to do EDI at the elemental level is in any pleading. Although everything else seems to be pled to the court, that's not one I see in the pleadings, that we need to get AT&T hooked up to the EDI.

So the fact that Ernst & Young, who in a wonderful full-page ad, which to me is not a bug caught between the reels, if you can afford to pay the Wall Street Journal for a full-page ad, says that there isn't a business we can't improve, which is their sig line here on the bottom, I wonder if the business they understand. I mean, obviously, they wouldn't have been hired unless they were -- were qualified to do this, but the fact that they can't understand that this is not a contested issue, that this is an issue that needs to be resolved to help Southwestern Bell get what it wants, and that's what disturbs me fundamentally.

A week ago, this was relevant. That's the standard. In discovery, is it

relevant? It's relevant. We've ruled today, in my mind. We've determined that there are violations of the public interest, one of which is the corporate behavior and attitude of Southwestern Bell, and I think unrebutted the -- the testimony I don't think requires a malicious intent. I'm not going to impute that in there. And I think, however, whether it's found or not, the point that AT&T alleges is largely proven, that there is an interference here that -- that is not indicative of a company that is interested in getting local competition off and operating in this state.

Having basically, I guess, given the -- the company the relief it sought, which is a finding that this -- the public interest has been not upheld by Southwestern Bell by this activity, regardless of intent, I think the actions of the activities speak for itself. I kind of think it's -- it's -- it's now moot.

I think the judge was right, it is relevant, the man should have been deposed. I think in -- in the -- the doctrine that you

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cite on not deposing the person, I think that assumes that that person wasn't directly involved in something that, you know, probably a mere underling should be involved in, but -- so I think it probably would at any stage be relevant to do that. But for, I think, different reasons, Pat, I would come to the same point, that the point has been proven by the evidence presented, and that anything further is really cumulative to a decision we've already reached that, you know, this kind of behavior is not acceptable for the purposes of 271 and the public interest.

So I would, I guess, conclude based on my final reading of all these depositions from the Ernst & Young people, that you've already made your point.

COMM. WALSH: I think that probably is all true and I would agree with -- with you, Mr. Chairman, that this isn't an issue of whether or not one would allow a chief executive officer to be deposed, but where you have any individual who's been directly involved in issues, then they have knowledge about those issues.

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The question of whether it's -- it's moot or whether it continues to be pertinent, I think I would agree with you if this commission were the -- were the person who decides these issues. But this record is being built for the FCC to decide these issues. And I think if we were dealing with anyone other than a CEO, the decision would probably clearly be that all parties who are involved in -- directly in these issues would be subject to being deposed.

If the issue is truly moot, then it's moot. But if it's not, then I don't think that we should have a different standard for someone who's involved in -- directly in issues before the commission or before the FCC because of their position in the corporation.

CHAIRMAN WOOD: I would sign an order to that effect. If it later becomes unmoot by some other activities, I think the better -- the better extent is the getting here while it's still -- before the issue has been decided. I -- I think sometimes -- again, I think the record that I read just as recently as last night, Mr. Laskawy's

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deposition just says a lot. I think if you're interested in making competition work, you don't do things like this. And to his credit, the man was pretty blunt about kind of how everything played out. And Mr. Spiropoulos, who was the other deponent in San Francisco, was very detailed about their operations. And, you know, part of me is, like, if you've got a tortious interference with contract claim, AT&T, take it to a district court. That's an interesting finding if you care to make it.

I think it's in my interest to get this thing moving forward with constructive things. I don't think this was a constructive action. I think y'all are correct on that, but I think it's time to -- I mean, I've spent -- the staff has spent a lot of time, I spent a lot of time reading this that I could have spent out getting a suntan in all the smog, but these are hard to read outside, I'll tell you. That's -- I think the ruling has been made on the broader issue that AT&T sought recovery of and that this was not the right thing to do. And I would just say it's

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time to move on.

But I think that the standard -- and, in fact, we probably ought to record that in writing. The standard is people directly involved in things are deposed, and so we don't have the lingering doubt that time basically was -- was the rescuer here, but it ought to not be that way in the future.

JUDGE FARROBA: Okay, so for now, then, this commission should be -- the commission that was issued should be pulled down, and then for Mr. Wren also?

CHAIRMAN WOOD: All parties, mm-hmm.

JUDGE FARROBA: All parties.

CHAIRMAN WOOD: We've heard what we needed to hear on the issue, and parties have argued it through whatever pleadings they made before this commission, and I guess my thought is evidence is sufficient to make the finding we made on the public interest.

COMM. WALSH: I think it has an impact on -- on the implementation docket as well and -- and I agree with you. I mean,